

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

VAN LOO FIDUCIARY SERVICES, an
Oregon Limited Liability Corporation, as
Personal Representative of the Estate of
Michael Reinoehl,

Plaintiff,

v.

THE UNITED STATES OF AMERICA;
PIERCE COUNTY, a political subdivision
of the State of Washington; the
MUNICIPALITY OF LAKEWOOD, a
municipal corporation; STATE OF
WASHINGTON; JAMES OLEOLE, an
individual; CRAIG GOCHA, an individual;
MICHAEL MERRILL, an individual; and
JACOB WHITEHURST, an individual,

Defendants.

No. 3:23-cv-05618-DGE

PLAINTIFF'S OPPOSITION TO
DEFENDANT UNITED STATES OF
AMERICA'S MOTION TO DISMISS
(DKT. NO. 45)

ORAL ARGUMENT REQUESTED

The United States brings a "facial attack," moving to dismiss Counts Three and Five on the grounds that the Court lacks subject matter jurisdiction over them. Dkt. No. 45 at 5. Counts Three and Five are based on the same theory of negligence; the difference between them is the law enforcement officers whose activity underlies the claim. *See* Dkt. No. 37 at 30-32. Count Three stems from the acts and omissions of United States Marshal Ryan Kimmel, a federal employee, and Count Five stems from the acts and omissions of Officers James Oleole,

1 Craig Gocha, Jacob Whitehurst, and Michael Merrill (Individual Defendants), who were
2 employed by state and local law enforcement agencies. *Id.*

3 In Counts Three and Five, Plaintiff alleges that law enforcement officers negligently
4 executed an arrest warrant with no clear plan, command structure, or means of communication
5 and shot and killed Michael Reinoehl without justification. The United States moves to dismiss
6 on the grounds that federal law enforcement officers have discretion to do so, so Plaintiff's
7 claims are barred by the discretionary function exception to the Federal Tort Claims Act
8 (FTCA), 28 U.S.C. §§ 1346, 2671–80. The Government's overbroad reading of the
9 discretionary function exception, the narrow challenge at issue in its motion, would restore
10 sovereign immunity in defiance of Congress's waiver. Its argument is not supported by the
11 law, and its motion to dismiss should be denied.
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13 I. FACTS

14 On September 3, 2020, law enforcement officers met to discuss how to "take" Michael
15 Reinoehl based on suspicion that he had committed murder. Dkt. No. 37 at 12. No arrest
16 warrant had been issued at the time of the meeting (*id.*), and Reinoehl had publicly claimed
17 that the underlying homicide was a lawful act of self-defense and defense of another person
18 (*id.* at 11). Some information provided during the law enforcement meeting was inaccurate,
19 misleading, incomplete, and/or out of context. *Id.* at 13. No real plan for how to implement the
20 operation was developed. *Id.* Nor did they plan how to communicate during the operation. *Id.*
21 at 13. Instead of developing a working communication plan, officers relied on Pierce County
22 law enforcement radio frequencies while operating in Thurston County, which was foreseeably
23 inadequate. *Id.* at 15.
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1 Officers believed Reinoehl was at an apartment complex in Lacey, Washington, (*id.* at
2 19) where he had gone to escape far-right extremists who he believed had made violent threats
3 against him and shot at his home while his children were present (*id.* at 10). Officers arrived
4 at the complex around 6:00 p.m. *Id.* at 19. Reinoehl exited the building at approximately 6:45
5 p.m. and walked toward his car, a Jetta. *Id.* at 22. Operating with garbled, static, and otherwise
6 inadequate communication, one officer cautioned “[w]ere too far, let him drive,” (*id.* at 2) but
7 Defendant Oleole radioed, “[l]et’s go take him;” “[t]ake him, take him now!” (*id.*; *id.* at 23).

9 With no clear command structure and without identifying themselves as law
10 enforcement, Defendant Merrill suddenly accelerated his vehicle, an Escape, and sped toward
11 Reinoehl’s Jetta. *Id.* Within seconds, Defendant Gocha raced to catch up, cutting an
12 intersection and careening over two grassy medians before stopping suddenly next to the
13 Escape. *Id.* Officers started shooting immediately. *Id.* at 24. None of the vehicles were readily
14 discernable as police vehicles. *See id.* at 24–25. Reinoehl, afraid because of the previous threats
15 made against his life and drive-by shooting at his home, ducked and ran away. *Id.* at 24.

17 Officers sprayed more than forty rounds through the quiet neighborhood, hitting
18 residential buildings, vehicles, backyards, and at least one occupied apartment. *Id.* at 25.
19 Shrapnel or debris grazed a child playing nearby. *Id.* Reinoehl had a small pistol in his pocket,
20 but he never removed or fired it. *Id.* at 25–26. Although Defendants Oleole, Merrill, and Gocha
21 said in statements that Reinoehl reached toward his waistband, Plaintiff disputes the accuracy
22 of those statements because they were given at least ten days after the incident, in violation of
23 law enforcement standards and giving officers time to coordinate their statements, and because
24 of internal and logical inconsistencies. *See id.* at 26–27. Reinoehl was shot at least five times
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1 and died on the scene as a result of three fatal gunshot wounds, two entered his back and one
2 his side. *Id.* at 27–28.

3 At the time of this incident, the U.S. Marshals Service had a mandatory policy requiring
4 deputies to use only the minimum force reasonably necessary under the circumstances. *Id.* at
5 16. Local law enforcement officers participating with the task force were required to comply
6 with their agencies’ guidelines concerning use of deadly force and with oaths, rights, and duties
7 under color of Washington state law. *Id.* at 17. Plaintiff seeks “[c]ompensation for Reinoehl’s
8 loss of his civil right to be free from the use of excessive force by law enforcement.” *Id.* at 34.

10 II. ORGANIZATION OF RESPONSE

11 Because the operative difference between Counts Three and Five is the law
12 enforcement officer whose actions serve as the basis for the alleged negligence, a distinction
13 not relevant to this motion, Plaintiff divides this response by issue instead of claim. First
14 discussing the allegedly negligent shooting, and then the allegedly negligent conduct that
15 preceded and foreseeably caused it.

17 III. LEGAL ARGUMENT

18 In making this facial attack, the United States’s only argument is that Counts Three and
19 Five allege “discretionary acts” that fall within the discretionary function exception to the
20 FTCA’s waiver of sovereign immunity. Dkt. No. 45 at 4.

21 The FTCA waives sovereign immunity, thus giving federal courts subject matter
22 jurisdiction, for:
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24 civil claims against the United States ... for injury or loss of property, or
25 personal injury or death caused by the negligent or wrongful act or omission of
26 any employee of the Government while acting within the scope of his officer or
employment, under circumstances where the United States, if a private person,

1 would be liable to the claimant in accordance with the law of the place where
2 the act or omission occurred.
3 28 U.S.C. § 1346(b). The discretionary function exception, however, “precludes liability under
4 the FTCA for claims ‘based upon the exercise or performance or failure to exercise or perform
5 a discretionary function or duty on the part of a federal agency or an employee of the
6 Government, whether or not the discretion involved be abused.’” *Valdez v. United States*, 56
7 F.3d 1177, 1179 (9th Cir. 1995) (quoting 28 U.S.C. § 2680(a)).

8 A claim falls within the discretionary function exception if it meets two criteria: first,
9 the act at issue is discretionary in nature, which necessarily involves an element of choice; and,
10 if so, it involves the type of judgment that the exception is designed to shield as a matter of
11 policy. *Miller v. United States*, 163 F.3d 591, 593 (9th Cir. 1998). Challenged conduct that
12 does not meet both criteria is not shielded by the discretionary function exception. *Berkovitz*
13 *by Berkovitz v. United States*, 486 U.S. 531, 536 (1988). Ultimately, whether or not a particular
14 claim is barred by the discretionary function is a question of statutory interpretation because it
15 is a statutory creation. *See United States v. Varig Airlines*, 467 U.S. 797, 813–14 (1984).
16 Consistent with this recognition, the Ninth Circuit has held that, as a remedial statute, the
17 FTCA should be read broadly while its exceptions should be interpreted narrowly. *O’Toole v.*
18 *United States*, 295 F.3d 1029, 1037 (9th Cir. 2002). In any case where they are claiming it, the
19 United States bears the burden to show that the discretionary function exception applies.
20 *Gonzalez v. United States*, 814 F.3d 1022, 1027 (9th Cir. 2016).

23 A. THE SHOOTING

24 The United States’ motion to dismiss should be denied as to the allegations about the
25 shooting because (1) alleged constitutional violations are not shielded by the discretionary
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1 function exception under Ninth Circuit law, and (2) a policy mandating that an officer use the
2 minimal force reasonably necessary under the circumstances does not give discretion to use
3 excessive force.

4 1. Law Enforcement Does Not Have Discretion to Violate the Constitution

5 No one, not even federal agents, have discretion to violate the Constitution. *Nieves*
6 *Martinez v. United States*, 997 F.3d 867, 877 (2021) (“Even if the agents’ actions involved
7 elements of discretion, agents do not have discretion to violate the Constitution.”); *Galvin v.*
8 *Hay*, 374 F.3d 738, 758 (9th Cir. 2004) (“As federal officials do not possess discretion to
9 violate constitutional rights, the discretionary function exception does not apply here.”); *Nurse*
10 *v. United States*, 226 F.3d, 996, 1002 (9th Cir. 2000); *Fuentes-Ortega v. United States*, 640 F.
11 Supp. 3d 878, 882–83 (D. Ariz. Nov. 14, 2022) (collecting cases where “the mere pleading of
12 a plausible constitutional violation rendered the discretionary function exception
13 inapplicable.”).

14 This rule recognizes that even discretion has boundaries. *See Loumiet v. United States*,
15 828 F.3d 935, 945 (D.C. Cir. 2016). Enforcing these boundaries does not turn an FTCA claim
16 into a constitutional claim. *Id.* It merely prevents the United States from using the discretionary
17 function exception as a shield where a plaintiff plausibly alleges that federal conduct exceeded
18 permissible boundaries by violating the Constitution. *Id.* at 943. If so, the claim continues
19 under the tort law of the state where the incident occurred. *Id.* at 945–46.

20 Plaintiff alleges that officers shot at Reinoehl almost immediately upon seeing him,
21 without identifying themselves as police officers, without justification from Reinoehl, and
22 killed him as he attempted to flee. As alleged, this violates “Reinoehl’s ... civil right to be free
23 from the use of excessive force by law enforcement.” *Id.* at 37; *see Tennessee v. Garner*, 471

1 U.S. 1, 9 (1985). Because of these allegation and the supporting facts pled in the First
2 Amended Complaint (FAC), the discretionary function exception does not shield the United
3 States from Plaintiff's claims related to the shooting.

4 Defendant may attempt to counter this argument by claiming that allegations related to
5 the shooting are a battery and cannot proceed under a theory of negligence. The Washington
6 State Supreme Court has squarely rejected this argument. *Beltran-Serrano v. City of Tacoma*,
7 193 Wn.2d 537, 544-45 (2019). As the FTCA borrows state tort law to create permissible
8 causes of action, Plaintiff may proceed on this theory under the FTCA. *See, e.g., Loumiet*, 828
9 F.3d at 945.

11 2. Policy Does Not Give Discretion to Use Excessive Force

12 Similarly, a policy mandating use of the minimal force reasonably necessary does not
13 give discretion to use excessive force.

14 A policy is not discretionary "if the employee's conduct cannot appropriately be the
15 product of judgment or choice." *Berkovitz*, 486 U.S. at 536. Using more force than reasonably
16 necessary under the circumstances falls outside the bounds of a policy mandating use of
17 minimal force. *Greico v. United States*, No. 1:14-cv-933-RHW, 2015 WL 1489356, at *3-4
18 (D. Ore. Apr. 1, 2015) (holding that policy requiring deputy U.S. Marshals to "always use the
19 minimum force reasonably necessary to protect themselves or others from bodily harm" is not
20 discretionary).

21 In *Gonzalez v. United States*, 814 F.3d 1022, 1027 (9th Cir. 2016), the primary case
22 relied upon by the United States, the Ninth Circuit explains this principle. The FBI policy at
23 issue said that agents "shall" promptly transmit credible information about serious criminal
24 activity falling outside the FBI's investigative jurisdiction a law enforcement agency having
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1 jurisdiction “except where disclosure would jeopardize an ongoing investigation, endanger the
2 safety of an individual, interfere with a human source, interfere with a human source’s
3 cooperation, or reveal legally privileged information.” *Id.* at 1029 (quoting FBI Guidelines §
4 VI(C)(2)). The court held that the policy was discretionary despite “mandatory-sounding
5 language” because it did not mandate disclosure. *Id.* Either option, to share or not to share
6 information, could be correct depending on the circumstances. *See id.*

7
8 Shooting a person without justification, however, cannot “appropriately be the product
9 of judgment or choice.” *Berkovitz*, 486 U.S. at 536. It is excessive and unequivocally prohibited
10 by a policy mandating use of the minimal force reasonably necessary. As alleged, the chaotic
11 and unjustified shooting of Reinoehl does not fall within the limited discretionary function
12 exception to the FTCA.

13 **B. PRE-SHOOTING CONDUCT**

14
15 Plaintiff is unaware of a specific policy regulating officers’ pre-shooting conduct, the
16 United States does not provide one, and Plaintiff has not had the opportunity to discover it.
17 Assuming officers had complete discretion in how to execute the arrest warrant, there is no
18 policy rationale for failing to establish a clear command structure or working means of
19 communication when executing an arrest warrant, especially one considered by law
20 enforcement to be high risk. Moreover, the United States incorrectly states that there is a
21 presumption that the officers’ pre-shooting conduct is based in policy considerations and
22 mischaracterizes Plaintiff’s pre-shooting allegations as relating to general discretion to execute
23 a search warrant. *See* Dkt. No. 45 at 8.

1 1. No Presumption That Pre-Shooting Conduct Was Based on Policy Considerations

2 The United States is not entitled to a presumption that these actions were grounded in
3 policy considerations because “[a]bsent a specific policy as to a particular action taken by a
4 Marshal, there is no corresponding presumption that such an action satisfies the policy element
5 of the discretionary function exception.” *Estate of Salazar v. United States*, 11-cv-10279, 2014
6 WL 12588477, at *21 (C.D. Cal. May 20, 2014).

7
8 The United States relies on *Nieves Martinez v. United States*, 997 F.3d 867, 881 (9th
9 Cir. 2021), (Dkt. No. 45 at 7) to argue the contrary, quoting, “when a court determines that an
10 agent’s actions are subject to discretion, a ‘strong presumption arises that the actions were
11 grounded in policy considerations.’” *Id.* (quoting *Gonzalez*, 814 F.3d at 1032). But this rule
12 comes with context. It originates from *United States v. Gaubert*, 499 U.S. 315, 324 (1990),
13 where the Supreme Court found that because a statute authorized the Federal Home Loan Bank
14 Board and Federal Home Loan Bank Board–Dallas to advise and oversee certain aspects of the
15 operation of a thrift institution, the discretion to give that advice was presumed to be and was
16 grounded in policy considerations. *See id.* at 334. That presumption only applied because
17 “established governmental policy, as expressed or implied by statute, regulation, or agency
18 guidelines” clearly allowed for the discretionary acts at issue. *Id.* at 324.

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20 Similarly, the Ninth Circuit relied on *Gaubert* in *Gonzalez v. United States*, 814 F.3d
21 at 1032, discussed *supra* at 8, to find that a policy specifically giving agents discretion to decide
22 whether to share information created a presumption that using that discretion was based on
23 legitimate policy considerations.
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1 Here, the United States has cited no specific policy that permits federal actors to
2 perform an arrest without coordination, communication, and a plan to minimize harm.
3 Moreover, failure to have a clear command structure or working communication systems is
4 not justified by policy considerations. With or without a policy-based presumption, these are
5 negligent acts of the kind subject to review under the FTCA .
6

7 2. Discretionary Function Exception Does Not Shield All Warrant-Related Activities

8 The United States mischaracterizes the discretionary function exception to assert it
9 shields virtually all law enforcement negligence—at least anything related to the planning and
10 execution of an arrest warrant. Dkt. No. 45 at 8. It does not.

11 “The basis for the discretionary function exception was Congress’s desire to ‘prevent
12 judicial “second-guessing” of legislative decisions grounded in social, economic, and political
13 policy through the medium of an action in tort.’” *Berkowitz*, 486, U.S. at 536–37 (quoting
14 *Varig*, 467 U.S. at 814). “[C]onduct that was allegedly inconsistent with the proper exercise of
15 professional judgement or technical skill,” is not protected by the discretionary function
16 exception. *Powers v. United States*, No. 21-cv-0517-TSZ, 2023 WL 1468479, at * (W.D.
17 Wash. Feb 2, 2023) (general assertions that Coast Guard must make “on-the-fly, life-or-death
18 decisions” do not indicate that allegedly negligent handling of vessel in distress was based on
19 legitimate policy considerations).
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22 Failing to have an operation plan, command structure, or working means of
23 communication are not issues that involve balancing social, economic, or political policy
24 considerations; they are basic failures of professional judgment. As stated in the FAC, the
25 communication failure occurred because officers used Pierce County radio frequencies while
26 operating in Thurston County. Dkt. No. 37 at 15. There was no competing policy-based

1 consideration to justify this negligence, which distinguishes this case from cases where law
2 enforcement operated with discretion grounded in policy. Determining whether sharing
3 information about a threat of violence would be harmful under the circumstances requires
4 balancing factors and making a subjective judgment call. *See Gonzalez*, 814 F.3d at 1032.
5 Investigating a crime and deciding whether to detain an individual whom law enforcement has
6 probable cause to believe committed a crime requires weighing the credibility of information,
7 importance of the crime, and the agency's mission and resources. *See Nieves Martinez*, 997
8 F.3d at 881. In contrast, failing to have a plan, command structure, or working means of
9 communication runs contrary to the goal of executing an arrest warrant. *See Patel*, 806 F. Supp.
10 at 878; *see also Green v. United States*, 630 F.3d 1245, 1252 (9th Cir. 2011) (differentiating
11 how to fight a forest fire, which involves policy considerations, from failure to notify citizens
12 whose properties could be in harm's way, which did not).

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14
15 This is not a disagreement about witness credibility or whether law enforcement should
16 have executed the search warrant that day. It is about whether law enforcement has unbridled
17 discretion to cause preventable chaos, confusion, and unjustified killing when executing an
18 arrest warrant. They do not.

19 As noted, the United States' position would essentially insulate law enforcement from
20 liability under the FTCA for any action related to execution of an arrest warrant and would
21 permit the exception to "swallow the FTCA." *O'Toole v. United States*, 295 F.3d at 1037
22 (citing *Gotha v. United States*, 115 F.3d 176, 179 (3d Cir. 1997) ("If the word 'discretionary'
23 is given a broad construction, it could almost completely nullify the goal of the FTCA.")). For
24 the U.S. Marshals Service, this would result in virtually any negligent conduct occurring on
25 the job being completely immunized. If Congress had intended such a rule, they would have
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1 said so. That certain acts related to executing a warrant require making legitimate judgment
2 calls does not provide blanket immunity for all warrant-related activity. *See, e.g., Myles v.*
3 *United States*, 47 F.4th 1005, 1012 (9th Cir. 2022) (“[T]he discretionary function exception
4 does not apply to law enforcement investigations when a federal employee’s tactics during an
5 investigation had no legitimate policy rationale.”) (internal quotation omitted); *Garcia v.*
6 *United States*, 826 F.2d 806, 808–09 (9th Cir. 1987) (“While law enforcement involves a
7 certain amount of discretion on the part of individual officers,” actions that negligently incite
8 violence and foreseeably cause harm “do not involve the sort of generalized social, economic
9 and political choices that Congress intended to exempt from tort liability.”); *Dietzman v. City*
10 *of Homer*, 2010 WL 4684043, at *29 (D. Alaska Nov. 17, 2010); *Patel*, 806 F. Supp. at 878;
11 *see also Terbush v. United States*, 516 F.3d 1125, 1135 (2008) (cautioning against an approach
12 that would “swallow the second prong of *Berkowitz*” and declining to “eviscerate the original
13 purpose of the [FTCA] by an overly-generous reading of the policy-based prong of the
14 exception”).

15 Discretionary immunity is the exception, not the rule, and it does not apply here.

16 17 **C. UNITED STATES HAS NOT MET ITS BURDEN**

18 The United States brings a facial attack, so “the court must accept all factual allegations
19 in the complaint as true and must construe the pleadings in the non-moving party’s favor.”
20 *Bingham v. Shaver Transportation Co.*, 647 F. Supp. 3d 1044, 1046 (W.D. Wash. Dec. 20,
21 2022). Construed in the light most favorable to Plaintiff, the United States has not met its
22 burden to show that the discretionary function exception applies.
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1 Plaintiff, however, is mindful that discretionary function exception analysis often
2 considers specific policy terms that have not been provided. To the extent that the Court has
3 any reservations about whether relevant policy or policies may affect its decision, it should
4 find that the United States has failed to meet its burden at this stage and deny its motion to
5 dismiss to permit development of the record. *See Hieda v. United States*, 836 F. Supp. 2d 1105,
6 1115–16 (D. Hawaii Dec. 23, 2011); *Prescott v. United States*, 973 F.2d 696, 703 (9th Cir.
7 1992).

9 IV. CONCLUSION

10 As alleged, federal law enforcement officers failed to make a plan, including for a
11 command structure or means of communication, before going to “arrest” Michael Reinoehl,
12 and they violated the Constitution and a non-discretionary policy when they shot and killed
13 him without justification. These actions are not discretionary acts grounded in policy
14 considerations of the type Congress intended to shield from liability. Therefore, the United
15 States has not met its burden to show that the discretionary function exception applies, the
16 Court has subject matter jurisdiction over Plaintiff’s FTCA claims, and the United States’
17 motion to dismiss should be denied.
18

19 DATED this 4th day of December, 2023.

20
21 I certify that this document
22 contains 3482 words,
23 in compliance with the
24 Local Civil Rules.
25
26

SCHROETER GOLDMARK & BENDER

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1 **CERTIFICATE OF SERVICE**

2 I hereby certify that on December 4, 2023, I electronically filed the foregoing with the
3 Clerk of the Court using the CM/ECF system which will send notification of such filing to the
4 following:

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DATED: December 4, 2023, at Seattle, Washington.

s/ Virginia Mendoza

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